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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 219

ESTATE OF DANIEL MCNICHOL, Deceased, ELLEN MCN. EVANGELISTA AND JOSEPH G. MCNICHOL, Executors, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 14a-22a)[1] are reported at 29 T.C. 1179. The opinion of the Court of Appeals (Pet. 14-23) is reported at 265 F. 2d 667.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. 24). The petition for a writ

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[1] "R." refers to the Appendix to the taxpayers' brief in the Court of Appeals.

of certiorari was filed on July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether on the facts of this case the decedent retained for his life the possession or enjoyment of certain income-producing real properties so that their value should be included in his gross estate for purposes of the federal estate tax under Section 811(c)(1)(B) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939, as amended (26 U.S.C., 1952 ed.):

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(c) *Transfers in contemplation of, or taking effect at, Death.*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * * * *

(B) under which he has retained for his life or for any period not ascertainable without ref-

erence to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

* * * * *

STATEMENT

The material facts as found by the Tax Court (R. 14a-18a, 22a) and the Court of Appeals (Pet. 15) may be summarized as follows:

The decedent died testate on June 17, 1951, a resident of Philadelphia, Pennsylvania. The taxpayers are the executors of his estate. (R. 14a.)

The decedent owned various income-producing real properties in Philadelphia. During the period 1939 to 1942, he executed general warranty deeds to these properties, naming his children as grantees. He had the deeds recorded, and after recordation they were returned to him and he kept them in his safe until he died. The deeds reserved no interest in the realty or rents to the decedent, and he received no consideration in connection with the transactions. (R. 15a-16a; Pet. 15.)

Contemporaneously with and subsequent to the execution of the deeds by the decedent, it was understood by the grantees, and they all orally agreed, that he would retain the income from the properties for the duration of his life. In accordance with this agreement and understanding, the decedent actually received all the income from the properties until he died. Prior to the decedent's death, none of the children-

grantees ever received any rental income whatsoever from the properties. (R. 16a-17a, 22a; Pet. 15.)

The Commissioner included all of these properties in the decedent's gross estate for purposes of the federal estate tax, and the Tax Court upheld the Commissioner. (R. 22a.) The Court of Appeals affirmed. (Pet. 23.)

ARGUMENT

Section 811(c)(1)(B) of the 1939 Code, *supra*, pp. 2-3, requires the inclusion in the decedent's gross estate of property donatively transferred by the decedent where he has retained for his life the "possession or enjoyment of, or the right to the income from, the property." Pursuant to an oral agreement with his children, the decedent here continued to receive the income from the property until his death. Taxpayers contend (1) that the oral agreement was unenforceable under Pennsylvania law, and (2) that the property is taxable only if the decedent had a legally-enforceable right to the income.

1. The Court of Appeals rejected taxpayers' contention that the oral agreement was not enforceable, finding that where, as here, the existence of the oral agreement is admitted by the grantees, an oral trust would be enforced under Pennsylvania law. Pet. 17, n. 3, citing *Metzger* v. *Metzger*, 338 Pa. 564, 14 A. 2d 285, and *Kauffman* v. *Kauffman*, 266 Pa. 270, 109 Atl. 640; see also *Williams* v. *Moodhard*, 341 Pa. 273, 19 A. 2d 101. That ruling on state law destroys the premise of the question of federal law sought to be presented by taxpayers and thus leaves no question appropriate for review by this Court.

2. The further holding of the courts below that the property was includible in the decedent's gross estate

whether or not his right to the income was legally enforceable is, in any event, clearly correct. For purposes of Section 811(c)(1)(B), it is enough, as the Court of Appeals said, that "the enjoyment of the properties which the decedent conveyed to his children was continued in decedent by prearrangement and ended only when he died" (Pet. 19). That the decedent relied upon his children's oral assurances rather than upon a more formal agreement did not change the substance of the transaction from one in which he did not finally part with the beneficial enjoyment of the property until his death, and it was precisely transfers of that character that the statute was designed to reach. See *Harter* v. *United States*, decided December 29, 1954 (N.D. Okla.), 48 A.F.T.R. 1964; cf. *Greene* v. *United States*, 237 F. 2d 848 (C.A. 7); *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C.A. 5), certiorari denied, 314 U.S. 634.

There is not, as taxpayers assert, a subsisting conflict with *Nichols* v. *Coolidge*, 274 U.S. 531. As explained in detail by the Court of Appeals (Pet. 19-23), that decision rested on the same basis as *May* v. *Heiner*, 281 U.S. 238, and both decisions were in effect nullified by the Joint Resolution of March 3, 1931, 46 Stat. 1516,[2] and overruled by *Commissioner* v. *Estate of Church*, 335 U.S. 632.

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[2] The joint resolution was reenacted by Section 803(a) of the Revenue Act of 1932, 47 Stat. 169, with but "slight verbal differences" (see *Hassett* v. *Welch*, 303 U.S. 303, 307), and as so amended was carried forward into Section 811(c) of the Internal Revenue Code of 1939.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1959.

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